(3)

No. 04-955

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually, and as an employee of KAPL, and Lockheed Martin,

Petitioners,

-against-

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, and ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES TO PROCEEDING

The petition for a writ of certiorari fails to include one party who has an interest in this proceeding. Petitioners set forth that William C. Reynheer, "is believed to have no interest in the outcome of this petition". (*See*, Petition for a Writ of Certiorari, pg. ii). The Petitioners' belief in this regard is without basis.

Prior to his death on October 10, 2004, Mr. Reynheer was a party to this age discrimination lawsuit. On May 14, 2002, the Third Amended Judgment was entered in Mr. Reynheer's favor against the Petitioners awarding him $667,942.28, plus interest and attorney fees. The Petitioners have not satisfied this money judgment.

On November 26, 2004, Mr. Reynheer's wife, Margaret P. Reynheer, was granted Letters Testamentary by the Surrogate Court in and for Schenectady County, New York. On January 25, 2005, an Order was issued by the Second Circuit Court of Appeals substituting Mrs. Reynheer for her deceased husband, William C. Reynheer, pursuant to FRAP 43(a)(1). A copy of the Second Circuit's Order is annexed hereto as Appendix "A". William C. Reynheer's estate continues to have a substantial interest in the outcome of this matter.

TABLE OF CONTENTS

Page

List of Parties to Proceeding i

Table of Authorities iii

Introduction 1

Counter Statement of the Case 4

Reasons for Denying the Writ 10

Point I

Petitioners Waived Argument that Disparate Impact Is Unavailable Under the ADEA 10

Point II

There Is No Need for this Court to Provide Guidance to the Lower Courts on the Evidentiary Standards for Resolving Disparate Impact Claims Under the ADEA 12

Point III

Petitioners Waived Argument that Disparate Impact Is Unavailable Under the NYSHRL 15

Conclusion 17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Beaulieu v. United States, 497 U.S. 1038 (1990) 13

City of Springfield v. Kibbe, 480 U.S. 257 (1987) 11, 14

Criley v. Delta Airlines, Inc., 119 F.3d 102 (2d Cir. 1997) 16

Estelle v. Gamble, 429 U.S. 97 (1976) 12

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13

Jarvis v. Ford Motor Co., 283 F.3d 33 (2d Cir. 2002) ... 11, 14

Lopez v. Davis, 531 U.S. 230 (2001) 11

Meacham, et al. v. KAPL, Inc., et al., 185 F.Supp.2d 193 (N.D.N.Y. 2002) ..... *passim*

Meacham, et al. v. KAPL, Inc., et al., 381 F.3d 56 (2d Cir. 2004) ..... *passim*

Powell v. Nevada, 511 U.S. 79 (1994) 12

Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004) 3, 12

Smith, Wado, et al. v. Xerox Corporation, 196 F.3d 358 (2d Cir. 1999) 13, 14, 16

U.S. v. Shannon, 342 U.S. 288 (1952) 12

U.S. v. United Foods, Inc., 533 U.S. 405 (2001) 11

STATE CASES

Bohlke v. General Electric, 293 A.D.2d 198 (3d Dep't 2002) 16

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES & REGULATIONS

29 U.S.C. § 621, *et seq.* 1

29 U.S.C. § 623(a)(2) 1

29 U.S.C. § 623(f)(1) 14

Fed.R.Civ.P. Rule 51(d) 11, 14, 15

Sup.Ct.R. Rule 10 ..... 13, 17

Sup.Ct.R. Rule 15 4

29 C.F.R. § 1625.7(d) 15

NEW YORK STATE STATUTES

Executive Law § 290, *et seq* 1

Executive Law § 296(1)(a) 1

INTRODUCTION

This is an age discrimination case which relates back to a 1995 involuntary reduction in force ("RIF") at the Knolls Atomic Power Laboratory located in upstate New York. That RIF resulted in the termination of 31 exempt, salaried employees, 30 of whom were over 40 years of age.

After exhausting their administrative remedies before the Equal Employment Opportunity Commission ("EEOC"), 26 of the 30 older, exempt, salaried employees terminated in the RIF commenced this action against Petitioners alleging illegal age discrimination in violation of both the Age Discrimination in Employment Act (29 U.S.C. § 621, *et seq.*, "ADEA"), and the New York State Human Rights Law (Executive Law § 290, *et seq.*, "NYSHRL").

The ADEA provides, in pertinent part, that, "it shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . ." (29 U.S.C. § 623(a)(2)). The NYSHRL is similar in that it provides, in pertinent part, that, "[i]t shall be an unlawful discriminatory practice . . . [f]or an employer . . . , because of the age . . . of any individual, . . . to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (Executive Law § 296(1)(a)). After a trial on liability, the jury found:

> As to the twenty-six plaintiffs who were employed in *exempt* positions, do you find that the plaintiffs have proven that a specific employment practice of the defendants listed below,

although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages?

Knolls Atomic Power Laboratory, Inc.	✓ Yes	__ No
Lockheed Martin, Inc.	✓ Yes	__ No
John J. Freeh	✓ Yes	__ No

Do you find that the plaintiffs have proven that in discriminating on the basis of age, the defendant acted willfully?

Knolls Atomic Power Laboratory, Inc.	✓ Yes	__ No
Lockheed Martin, Inc.	✓ Yes	__ No

The jury's liability verdict determined that Petitioners, as employers, willfully violated the ADEA and the NYSHRL when they instituted a specific employment practice which adversely affected Respondents, as employees, because of their ages.

During the damages phase of the trial, the jury awarded each Respondent money damages under both the ADEA and the NYSHRL to compensate them for the economic losses and/or mental anguish suffered as a result of Petitioners' unlawful age discrimination.

The jury's verdict was supported by the evidence at trial. It was upheld by the United States District Court for the Northern District of New York. *Meacham, et al. v. KAPL, Inc., et al.*, 185 F.Supp.2d 193 (N.D.N.Y. 2002). The District Court's decision was thereafter affirmed by the United States Court of Appeals for the Second Circuit. *Meacham, et al. v. KAPL, Inc., et al.*, 381 F.3d 56 (2d Cir. 2004).

Petitioners now ask this Court to address whether a disparate impact age discrimination claim is viable under the ADEA. (*See*, Petition for a Writ of Certiorari, pg. i). The Court should deny the petition in this regard on the grounds that: (1) the Second Circuit ruled that Petitioners waived this argument. *Meacham*, 381 F.3d at 70 (2d Cir. 2004) ("KAPL's failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver"); and (2) the conflict among the circuit courts of appeals regarding this precise issue will be resolved when the Supreme Court decides *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004).

Petitioners also ask this Court to provide the applicable evidentiary standards to establish a disparate impact age discrimination claim under the ADEA. (*See*, Petition for a Writ of Certiorari at pg. i). The Court should deny the petition in this regard on the grounds that: (1) the petition fails to allege that there is any disagreement among the lower courts regarding the applicable evidentiary standards to prove disparate impact age discrimination under the ADEA; and (2) Petitioners are now raising several new issues which were never presented to nor ruled on by the jury, the District Court, or the Second Circuit.

Finally, Petitioners ask this Court to resolve whether the Second Circuit was bound to apply New York's substantive law regarding the NYSHRL, as articulated by the State Appellate Division Third Department. (*See*, Petition for a Writ of Certiorari at pg. i). The Court should deny the petition in this regard on the grounds that: (1) both the District Court and the Second Circuit held that Petitioners waived their argument that disparate impact is unavailable under the NYSHRL; (2) the Second Circuit was

justified in not following that Third Department's decision since that court was misinterpreting two prior holdings of the Second Circuit; and, (3) this argument does not present a compelling federal question which is of importance to the public.

COUNTER STATEMENT OF THE CASE

The rules of this Court instruct counsel to, "address any perceived misstatements of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." (Sup.Ct.R. Rule 15). The petition in this case is replete with self-serving misstatements of fact which have no support in the record before the District Court nor the Second Circuit.

The misstatements of fact include Petitioners' claim that they "attempted to meet their staffing ceiling without laying off employees involuntarily, but could not avoid the RIF." (*See*, Petition for a Writ of Certiorari at pg. 3). They erroneously claim that they "reviewed the reasons supporting each termination and concluded that each of the low rankings was the result of legitimate, non-discriminatory reasons unrelated to the individual's age." (*Id.* at pgs. 3-4). They falsely assert that they "proceeded, in good faith, with the RIF". (*Id.* at pg. 4). Finally, Petitioners mislead the Court by claiming that "[e]ach layoff selection was reviewed by a panel of senior managers called the Review Board" and that "KAPL's in-house counsel also reviewed the ranking process." (*Id.*). All of these claims are self-serving, have no support in the record, and were rejected by the jury, the District Court, and the Second Circuit.

The Second Circuit found that for fiscal year 1996, the manpower ceiling at the Knolls Atomic Power Laboratory would be declining by 108 jobs. *Meacham*, 381 F.3d at 63. Despite this fact, Petitioners wanted to hire 35 new employees. *Id.*

Contrary to Petitioners' self-serving claims, they did not proceed in good faith with respect to age discrimination and the RIF. As the Second Circuit noted in its decision, before the RIF started, Petitioners, "made several different projections concerning its impact on the workforce by age group." *Meacham*, 381 F.3d at 63. These projections included numerous tables analyzing the RIF which organized the workforce into age categories and included a document which stated:

> Cost data for each job group was utilized based on what age group we believe would be impacted. For example – there are a large number of excess skills in the mechanical system engineering areas. The 30-39 year age group would be primarily affected.

The Second Circuit observed that before the RIF started, managers employed by Petitioners determined which sections had skills which were "excess". *Meacham*, 381 F.3d at 63. During the trial, Petitioners admitted that some managers raised concerns about losing younger employees in the impending workforce reduction, and that this was considered when Petitioners formulated their Workforce Reduction Plan ("WRP"). The documentary evidence presented at trial corroborated this. For example, one manager wrote a letter to those drafting the WRP in which he stated his ideas for the downsizing, and cautioned against a "last in first out" methodology, since Petitioners would "lose some of best young hires". The

manager who principally designed the WRP even wrote in his diary "*Target Retirement Age*".

Contrary to the argument asserted by Petitioners, the record established that they could have avoided the RIF. The Second Circuit found that since Petitioners were 108 jobs over their manpower budget, and they planned on adding 35 new employees, they needed to eliminate 143 employees. *Meacham*, 381 F.3d at 63. In order to accomplish this reduction, Petitioners studied voluntary separation plans (VSP) where employees would resign in exchange for money. *Id.* The Second Circuit observed that Petitioners "consistently estimated that the average voluntary separation would cost it less than the average involuntary termination." *Id.* Petitioners analyzed offering a VSP to its entire workforce provided applications could be rejected if business needs dictated. *Id.* Petitioners "estimated that between 200 and 250 people would have elected to participate in such a plan." *Id.* The District Court found that evidence established that this plan would have enabled Petitioners to reduce its headcount to a level at or below its manpower budget, at a comparable cost, without a disparate impact on employees 40 years of age or older. *Meacham*, 185 F.Supp.2d at 214.

Petitioners decided to enact a WRP which included both a limited VSP and a RIF. *Meacham*, 381 F.3d at 63. The VSP component was limited because it required employees to have at least 20 years of service to participate. *Id.* Petitioners offered the VSP to its employees and 108 eligible candidates applied. *Id.* Petitioners approved 107 applications. *Id.* Petitioners were only one position over budget. The District Court found that the evidence supported the conclusion that if Petitioners instituted a hiring freeze, the RIF could have been avoided. *Meacham*,

185 F.Supp.2d at 214. However, to make room for the 35 new hires, Petitioners elected to involuntarily terminate 36 employees. Petitioners replaced the eliminated jobs with positions filled by new, younger employees (average age: 27). *Id.* at 202 fn. 4 & 217.

The statistical evidence introduced during the trial refutes Petitioners' self-serving claim that they proceeded in good faith and that the termination decisions were unrelated to age. Immediately preceding the RIF, Petitioners employed 2,063 exempt employees. *Meacham*, 381 F.3d at 64. Of those employees, 58% were 40 years of age or older (hereinafter referred to as "older employees") and 42% were under 40 years of age (hereinafter referred to as "younger employees"). *Id.* at 65. During the trial, Petitioners admitted that all of the exempt employees were potentially exposed to termination under the RIF. *Meacham*, 185 F.Supp.2d at 209.

Petitioners identified sections which possessed excess skills following the VSP. *Meacham*, 381 F.3d at 63. Petitioners selected some, but not all, employees with excess skills to be compared on matrices. *Id.* Petitioners identified 245 of the 2,063 employees and listed them on 32 different matrices. *Id.* at 64. Of the 245 employees, 179 (73%) were older employees, and only 66 (27%) were younger employees. *Id.* at 65. Once on a matrix, employees were compared by managers in terms of their criticality, flexibility, performance, and company service. *Id.* at 63. This RIF process resulted in 31 exempt employees being terminated, 30 of whom (98%) were older employees. *Id.* at 64. The Second Circuit characterized these as "startlingly skewed results." *Id.* at 75 fn. 8.

The Second Circuit found that there was ample evidence to support the conclusion that Petitioners' "procedures for guarding against disparate impact age discrimination were inadequate." *Id.* at 77. The evidence established that Petitioners failed to take any meaningful steps to ensure that conscious or subconscious age bias did not infect the RIF process. During the trial, managers who selected older employees for termination testified that they received no training on avoiding age discrimination in the RIF. *Id.*

Petitioners are attempting to mislead the Court by arguing that to ensure fairness, they engaged in several levels of review before the RIF was implemented. For example, Petitioners refer to a panel of senior managers called the Review Board. However, the record establishes that the Review Board received no age discrimination training, was not provided with the ages of employees, and had no role in assessing or monitoring any issue regarding age discrimination. *Id.* at 64 & 77. During the trial, the District Court even observed, "there's no evidence . . . that the review board considered age in any of its examinations or any of its reviews in this matter." (Trial Transcript, pg. 1510)

Petitioners also claim that their in-house counsel reviewed the process. However, in its decision, the Second Circuit criticized counsel's review, characterizing it as "quite limited" and "far from systematic". *Id.* at 64, 75, 77. Counsel's review "appears to have consisted primarily of having a paralegal check the managers' math" on each matrix. *Id.* at 75. Despite knowing that 98% of those selected for termination were older employees, counsel failed to speak with each manager who completed a matrix. *Id.* at 64. During the trial, counsel testified that he

could recall speaking to only 3 of the more than 29 managers who prepared a matrix. He did not review the ages of those on a matrix. *Id.* He failed to perform an adverse age impact analysis in violation of Petitioners' WRP. *Id.* In fact, he relied on the adverse impact analysis prepared by an employee who had received no training on preparing such an analysis, and never read any books or articles on how to prepare one. *Id.* This adverse impact analysis compared the average age of Petitioners' workforce before the RIF with the average age of the workforce after the RIF. *Id.* The Second Circuit characterized this methodology as "patently inadequate". *Id.* at 77.

Dr. Janice Madden, a qualified expert in the area of employment discrimination and statistics, testified that after analyzing the demographics of Petitioners' entire workforce, the probability that 98% of those selected for termination would be older workers in an age neutral RIF was only 1 in 348,000. *Id.* at 65. She also testified that after analyzing the demographics of 245 employees placed on the matrices by Petitioners, the probability that approximately 98% of those selected for termination would be older workers in an age neutral RIF was 1 in 1,260. *Id.* The Second Circuit agreed with the District Court's finding that either of these populations was appropriate to study for disparate impact in this case. *Id.* at 67, 74. Dr. Madden testified that each of the disparities she observed was statistically significant. *Id.* She further testified that the manner in which Petitioners subjectively scored the employees for criticality and flexibility most accounted for the statistically significant disparities she observed. *Id.* Dr. Madden ruled out other non-age factors such as "excess skills" as possible explanations for these statistical disparities. *Id.* Finally, Dr. Madden concluded that the

procedures set up by Petitioners to review managers' decisions failed to offer adequate protections to keep the conscious and/or subconscious prejudices of managers from influencing the outcome of the RIF. *Id.*

The Second Circuit held that based on the record before it, there was at least one suitable alternative that Petitioners could have employed to reduce its headcount to a level at or below its manpower budget, at a comparable cost, without a disparate impact on employees 40 years of age or older. *Id.* at 75. Petitioners could have designed the RIF "with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Id.* The Second Circuit concluded that based on the evidence before it, Petitioners "could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs." *Id.*

As both the District Court and the Second Circuit held, there was ample evidence supporting the jury's verdict that Petitioners instituted a specific employment practice which adversely affected Respondents because of their ages in violation of both the ADEA and the NYSHRL.

REASONS FOR DENYING THE WRIT

POINT I

PETITIONERS WAIVED ARGUMENT THAT DISPARATE IMPACT IS UNAVAILABLE UNDER THE ADEA

This Court should deny Petitioners a writ of certiorari to consider whether a disparate impact age discrimination

claim is viable under the ADEA. The Second Circuit expressly held that Petitioners waived this argument before the District Court. *Meacham*, 381 F.3d at 70.

Petitioners waived this argument when they submitted their requests to charge the jury specifically asking the District Court to provide instructions regarding disparate impact under the ADEA. (*See*, Appendix "B", *Defendant's Proposed Request to Charge*, Instructions 18, 21, 22, 36 & 38). Moreover, both during the charge conference and after the District Court instructed the jury, Petitioners failed to assert an objection that disparate impact was unavailable under the ADEA. (*See*, Appendix "C", a copy of transcript setting forth the District Court's charge to the jury regarding disparate impact). Petitioners again waived their argument in this regard. *See*, Fed.R.Civ.P. Rule 51(d); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (holding that "there would be considerable prudential objection to reversing a judgment because of instructions that a petitioner accepted, and indeed itself requested."); *U.S. v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Lopez v. Davis*, 531 U.S. 230, 244 fn. 6 (2001); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002) (holding that "Ford asked for this jury charge, presumably for strategic reasons, and was well appraised of the law of waiver. To excuse Ford from well-established rules of waiver would permit precisely the sort of *sandbagging* that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve.")

Petitioners further waived their right to argue on appeal that disparate impact was unavailable under the ADEA, when they made and renewed their Rule 50 motion for judgment as a matter of law ("JMOL"). Petitioners did not seek a judgment dismissing Respondents' disparate

impact claim on the ground that it was unavailable under the ADEA. The Second Circuit properly held that Petitioners "failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver." *Meacham*, 381 F.3d at 70.

Petitioners correctly point out that there is disagreement among the circuit courts of appeals regarding whether the disparate impact theory may be used to prove a violation of the ADEA. However, in light of Petitioners' waiver, that should have no bearing on this case. The conflict among the courts of appeals regarding this precise issue will be resolved when the Supreme Court decides *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S.Ct. 1724 (2004). There, the parties fully briefed all of the issues which the Petitioners now seek to raise in Point I of their petition. There is no reason for this Court to revisit these issues. The Supreme Court has observed that "[w]e make poor use of judicial resources when, as here, we take a case merely to reaffirm (without revisiting) settled law." *Powell v. Nevada*, 511 U.S. 79, 87 (1994) (Thomas, J., dissenting), *citing*, *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), *United States v. Shannon*, 342 U.S. 288, 294-295 (1952) (opinion of Frankfurter, J.).

POINT II

THERE IS NO NEED FOR COURT TO PROVIDE GUIDANCE TO LOWER COURTS ON THE EVIDENTIARY STANDARDS FOR RESOLVING DISPARATE IMPACT CLAIMS UNDER THE ADEA

This Court should deny Petitioners a writ of certiorari to decide the applicable evidentiary standards to establish

a disparate impact age discrimination claim under the ADEA. It is respectfully submitted that: (1) the petition does not allege that there is any disagreement among the lower courts regarding this issue; and (2) Petitioners are now fundamentally changing their trial strategy by raising new issues which were never presented to nor ruled on by the jury, the District Court or the Second Circuit.

The Supreme Court's rules set forth the character of reasons that will be considered in deciding a petition seeking a writ of certiorari. Sup.Ct.R. Rule 10. "Among these considerations is whether there is a conflict between two courts of appeals, between a court of appeals and the highest court of a State, or between two state courts of last resort." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting). Petitioners fail to allege that there is any disagreement among the lower courts as to the appropriate evidentiary standards to prove disparate impact age discrimination under the ADEA. Before the Supreme Court expends its limited time on this issue, other courts of appeals should have the opportunity to express their opinions to see if any conflict develops.

Moreover, Petitioners now raise new issues which were never presented to nor ruled on by the jury, the District Court or the Second Circuit. Petitioners complain that, "the Second Circuit purported to apply the same disparate impact analysis the Supreme Court articulated in *Griggs*." (Petition for a Writ of Certiorari, pg. 10). However, during the proceedings before the District Court, Petitioners specifically requested jury instructions setting forth the precise burden shifting analysis articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as interpreted by the Second Circuit in *Smith, Wado, et al. v.*

Xerox Corporation, 196 F.3d 358, 364-368 (2d Cir. 1999). (*See*, Appendix "A"). During the charge conference and after the charge was given to the jury, Petitioners failed to object to the instructions regarding the burden shifting analysis articulated in *Smith, Wado*. (*See*, Appendix "B"). In light of the foregoing, Petitioners have waived any argument in this regard. *See*, Fed.R.Civ.P. Rule 51(d); *City of Springfield*, 480 U.S. at 259; *Jarvis*, 283 F.3d at 62.

Petitioners note that the ADEA (29 U.S.C. § 623(f)(1)) provides employers with affirmative defenses involving bona fide occupational qualifications ("BFOQ") and reasonable factors other than age ("RFOA").(Petition for a Writ of Certiorari, pg. 10). Petitioners claim that they "were able to prove at trial that their decisions were based upon reasonable factors other than age." (*Id.* at pg. 13). However, there is no jury verdict, District Court finding, or Second Circuit decision supporting Petitioners' contention in this regard. In its written decision denying the Petitioners' motion for JMOL, the District Court discussed Petitioners' burden of persuasion and the charge to the jury which Petitioners requested and thereafter accepted without objection. *Meacham*, 185 F.Supp.2d at 212-214. Issues regarding the affirmative defenses of BFOQ and/or RFOA were never presented to nor ruled on by the jury, the District Court, or the Second Circuit. Petitioners waived this argument before the District Court. *See*, Fed.R.Civ.P. Rule 51(d). It is incredible that Petitioners are attempting to fundamentally change their trial strategy by raising this issue for the first time before the Supreme Court.

Petitioners argue that this Court should provide guidance to the EEOC, "which has issued regulations purportedly permitting employers to avoid liability only by

establishing an affirmative defense that their decisions are based upon 'business necessity' ". (Petition for a Writ of Certiorari, pg. 11). Once again, no party raised this issue before the District Court and the jury was given no instructions regarding the "business necessity" standard set forth in the EEOC's regulations. (29 C.F.R. § 1625.7(d)). Petitioners waived this argument before the District Court and cannot now raise it for the first time before the Supreme Court. *See*, Fed.R.Civ.P. Rule 51(d).

POINT III

PETITIONERS WAIVED ARGUMENT THAT DISPARATE IMPACT IS UNAVAILABLE UNDER THE NYSHRL

The Petitioner ask this Court to resolve whether the Second Circuit was bound to apply New York State substantive law, as articulated by the State's Appellate Division Third Department, which failed to recognize disparate impact age discrimination under the NYSHRL. It is respectfully submitted that this Court should deny the petition in this regard on the grounds that: (1) both the District Court and the Second Circuit held that Petitioners waived their argument that disparate impact claims are unavailable under the NYSHRL; (2) the Second Circuit was justified in not following the Third Department's decision since that court misinterpreted two prior holdings of the Second Circuit; and, (3) this argument does not present a compelling federal question which is of importance to the public.

In essence, Petitioners argue that the Second Circuit erred when it refused to forgive Petitioners' admitted waiver of their argument that disparate impact is unavailable

under the NYSHRL. *Meacham*, 381 F.3d at 71; *Meacham*, 185 F.Supp.2d at 216-217. Petitioners fail to cite any binding legal authority promulgated by this Court, and/or another federal court of appeals, and/or the New York State Court of Appeals, to support their argument in this regard.

Additionally, the Second Circuit should not be required to apply the Third Department's decision in *Bohlke v. General Electric*, 293 A.D.2d 198 (3d Dep't 2002), to determine whether disparate impact is available under the NYSHRL. The Second Circuit properly questioned the holding in *Bohlke*, which has not been followed by New York's three other Appellate Divisions nor the Court of Appeals. In *Bohlke*, the Third Department relied on the Second Circuit's holding in *Smith, Wado*, 196 F.3d at 363 fn. 1, for the general rule that claims brought under the ADEA and NYSHRL should be analyzed identically. In addition, the Third Department also relied on the Second Circuit's decision in *Criley v. Delta Airlines, Inc.*, 119 F.3d 102 (2d Cir. 1997), (which held that under the ADEA a plaintiff could not create subgroups to do a disparate impact analysis) for its ruling that under the NYSHRL, a plaintiff cannot create subgroups to do a disparate impact analysis. *Meacham*, 381 F.3d at 71. The Second Circuit questioned the Third Department's reasoning in this regard. The Second Circuit found that its general rule requiring ADEA and NYSHRL claims to be analyzed identically should have little application to the subgrouping issue under the NYSHRL since the ADEA protects workers 40 and over and the NYSHRL protects workers 18 and over. *Id.*

This issue does not require the Supreme Court to resolve a conflict between two courts of appeals, or between

a court of appeals and the highest court of a State, or between two state courts of last resort, thus it does not possess any of the reasons that may result in granting a petition seeking a writ of certiorari. Sup.Ct.R. Rule 10.

CONCLUSION

Respondents respectfully request that the Court issue an Order denying the petition for a writ of certiorari and granting any additional relief the Court deems just and proper.

Dated: February 8, 2005

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

(Filed Jan. 25, 2005)

Meacham, et al. v. KAPL, Inc., et al.

Docket Number(s):
02-7378(L); 02-7474(XAP)

Motion for:
Substitution of Party

Set forth below precise, complete statement of relief sought:

The substitution of Margaret P. Reynheer of her late Husband William C. Reynheer pursuant to FRAP Rule 43(a)(1).

MOVING PARTY:
Margaret P. Reynheer

☒ Plaintiff
☐ Appellant/Petitioner

MOVING ATTORNEY:
John B. DuCharme, Esq.

OPPOSING PARTY:
KAPL, Inc., et al.

☐ Defendant
☐ Appellee/Respondent

OPPOSING ATTORNEY:
Margaret A. Clemens, Esq.

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Court-Judge/Agency appealed from: U.S. District Court, N.D.N.Y.; Hon. David R. Homer, U.S. Magistrate Judge

Please check appropriate boxes:

Has **consent** of opposing counsel:

A. Been sought?
☒ Yes ☐ No

B. Been obtained?
☒ Yes ☐ No

Is oral argument requested?
☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☒ Yes ☐ No
If yes, enter date 09/03/03

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTION PENDING APPEAL:

Has request for relief been made below?
☐ Yes ☒ No

Has this relief been previously sought in this Court?
☐ Yes ☒ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

/s/ John B. DuCharme **Date:** January 21, 2005

Has **service been** effected?

☒ Yes ☐ No

[Attach proof of service]

ORDER

IT IS HEREBY ORDERED that the motion to substitute Margaret P. Reynheer for her late Husband, appellee and cross-appellant William C. Reynheer pursuant to FRAP 43(a)(1) is GRANTED.

FOR THE COURT:
ROSEANN B.
MACKECHNIE, CLERK

By:

/s/ Tracy W. Young
Tracy W. Young Motions
Staff Attorney

_____
Date

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CLIFFORD B. MEACHAM; THEDRICK L. EIGHMIE; and ALLEN G. SWEET, individually and on behalf of all other persons similarly situated, Plaintiffs, - against - KNOLLS ATOMIC POWER LABORATORY, Inc., a/k/a KAPL, Inc.; LOCKHEED MARTIN, INC.; and JOHN J. FREEH, individually and as an employee of KAPL and Lockheed Martin, Defendants.	**No. 97-CV-12 (DRH) (Lead Case)**
JAMES R. QUINN, PhD, Plaintiff, - against - KNOLLS ATOMIC POWER LABORATORY, Inc., a/k/a KAPL, Inc.; LOCKHEED MARTIN, INC.; and JOHN J. FREEH, individually and as an employee of KAPL and Lockheed Martin, Defendants.	**No. 97-CV-45 (DRH) (Member Case)**

DEFENDANTS' PROPOSED REQUESTS TO CHARGE

EPSTEIN BECKER & GREEN, P.C.
250 PARK AVENUE NEW YORK, N.Y. 10177-0077

(212) 351-4500
Attorneys for Defendants

* * * *

Requested Instruction No. 18

(Summary of Plaintiffs' Claims)

The plaintiffs have sued the defendants under two different laws against age discrimination as a result of their terminations. The first is the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*; the second is the New York State Human Rights Law ("HRL"), Executive Law of the State of New York §§ 290 *et seq.*

The plaintiffs base their claims of discrimination on two theories: disparate treatment and disparate impact. Under a disparate treatment theory, plaintiffs allege that defendants intentionally discriminated against them because of their ages. Under a disparate impact theory, plaintiffs allege that defendants had an employment practice which is neutral in its face, but actually falls more harshly on older employees and is not justified by business needs.

Defendants deny violating the law under either of these theories.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 985-86 (1988); *Smith v. Xerox Corp.,*

196 F.3d 358, 364-65 (2d Cir. 1999); *District Council 37 v. New York City Dep't of Parks & Recreation,* 113 F.3d 347, 351-52 (2d Cir. 1997); Waisome, 948 F.2d 1370, 1374 (2d Cir. 1991); see Complaint and Answer.

* * *

Requested Instruction No. 21

(Disparate Impact – Defendant's Burden of Production)

If, and only if, the plaintiffs have proven their prima facie case for their claim of disparate impact, the defendants must explain the business justification for the RIF. The issue is whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer. The practice or policy need not be " 'essential' or 'indispensable' " to the employer's business for it to pass muster.

Wards Cove Packing Company, Inc., et al., v. Atonio, 490 U.S. 642, 659 (1989); *EEOC V. Joint Apprenticeship Comm.,* 186 F.3d 110, 120 (2d Cir. 1999); *Waisome,* 948 F.2d at 1375.

Requested Instruction No. 22

(Disparate Impact – Plaintiffs' Ultimate Burden)

Once defendants have demonstrated the business justification of the RIF, plaintiffs can prevail only if the [sic] prove that KAPL's explanation is a pretext for discrimination. To satisfy this burden, plaintiffs must prove that another option without a similarly undesirable age effect would also serve KAPL's legitimate interests. Any alternatives, however, must be equally effective as KAPL's chosen procedure, the RIF, in achieving KAPL's legitimate

employment goals. Other burdens of any proposed alternatives are relevant when deciding whether or not plaintiffs' alternatives are equally effective as KAPL's chosen method in achieving KAPL's legitimate business goal.

Wards Cove, 490 U.S. at 660; *Watson,* 487 U.S. at 998; *District Council 37,* 113 F.3d at 352; *Waisome,* 948 F.2d at 1375.

* * *

Requested Instruction No. 36

(Disparate Impact – Plaintiffs' Burden of Proof – Prima Facie)

Plaintiffs also claim the defendants' actions had a disparate impact on workers over forty. To establish a prima facie case of disparate impact, the plaintiffs must prove by a preponderance of the evidence that (1) a facially neutral policy or practice of the defendants resulted in significantly discriminatory adverse impact on workers over forty, and (2) the policy or practice caused the discharge of plaintiffs because of their age.

If you decide that the plaintiffs have failed to prove a prima facie case of a disparate impact, then you must decide in favor of the defendants.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988); *Smith v. Xerox Corp.,* 196 F.3d 358, 364-65 (2d Cir. 1999); *District Counsel 37, AFSCME v. New York City Dep't of Parks and Recreation,* 113 F.3d 347, 351-52 (2d Cir. 1997); *Waisome v. Port Auth.,* 948 F.2d 1370, 1374-75 (2d Cir. 1991); *Lowe v. Commack Union Free Sch. Dist.,* 886 F.2d 1364, 1369-70 (2d Cir. 1989).

* * *

Requested Instruction No. 38

(Plaintiffs' Burden of Proof – Disparate Impact)

In order to prevail on their claim that the defendants' decision-making process has disparately impacted on members of the plaintiffs' class because of their age, plaintiffs must prove by a preponderance of the evidence that defendants' reason for the RIF is a pretext for discrimination. To do this, plaintiffs must prove that there are other employment practices that would achieve the employer's legitimate business interests without causing a disparate impact on the older employees.

Wards Cove, 490 U.S. 642, 660-61 (1989); *Watson,* 487 U.S. at 998; *Smith v. Xerox Corp.,* 196 F.3d 358, 365 (2d Cir. 1999); *District Council 37 v. New York City Dep't Parks & Recreation,* 113 F.3d 347, 351-52 (2d Cir. 1997); *Waisome v. Port Authority of New York and New Jersey,* 948 F.2d 1370, 1375 (2d Cir. 1991).

* * *

Dated: June 12, 2000
New York, New York

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

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APPENDIX C

02-7378(L), 02-7474(XAP)

United States Court of Appeals

For the

Second Circuit

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE and ALLEN G. SWEET, Individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, PAUL M. GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PARENE, WILLIAM C. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND and CARL T. WOODMAN,

Consolidated Plaintiffs-Appellees

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

EXHIBIT TRIAL TRANSCRIPT VOLUME VI

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* * *

[4731] The second theory is the disparate impact theory. Under the disparate impact theory, the 26 plaintiffs who held exempt positions at Knolls Atomic allege that the practices by which they were selected for termination of their employment in the Reduction in Force, while fair on their face, were discriminatory in operation. The two nonexempt plaintiffs, Ronald Butler, Sr., and Janice [4732] Polsinelle, do not assert claims under this theory and you may not consider either of them under this theory.

Moreover, this theory applies equally to all 26 exempt employees. Therefore, you must consider the plaintiffs' claims under this theory as to the class or group of 26 exempt plaintiffs and not individually as to each plaintiff.

Under this theory, the 26 exempt plaintiffs allege that the method by which the defendants selected the plaintiffs, although nondiscriminatory on its face, had an adversse impact on the plaintiffs as employees who were 40 years of age or older. Unlike the disparate treatment theory, the disparate impact theory does not require that a defendant intended to discriminate against them on the basis of their ages to establish the claim. It is sufficient if the plaintiffs establish by a preponderance of the evidence that they experienced an adverse impact different from

similarly situated co-workers because of the ages of the plaintiffs, whether or not the defendant you are considering intended that such a result occur.

Your determination of the plaintiffs' disparate impact theory involves three steps. First, you must determine whether the plaintiffs have offered evidence that a specific employment practice of the defendants, although neutral on its face, had an adverse impact on the [4733] plaintiffs as employees 40 years of age or older.

The plaintiffs must demonstrate by statistical evidence that the specific employment practice caused the plaintiffs to be selected for termination of their employment in the Reduction in Force because of their ages. In considering the statistical evidence, you must first determine the group or groups to which the plaintiffs reasonably should be compared. You must then consider the statistical – statistics comparing the groups. There is no minimum statistical threshold requiring a finding that the plaintiffs have demonstrated a disparate impact.

However, you may, but are not required to, consider that a finding of two standard deviations is significant. This means that there is about one chance in 20, or 5 percent, that the explanation for a deviation could be random. Such a deviation must be accounted for by some factor other than chance. In general, the higher the standard deviations found by you, the higher the probability of discrimination.

You must know, however, that I describe these considerations for you as, quote, probabilities, unquote, not, quote, certainties, unquote, that any statistical deviations you find resulted from the ages of the plaintiffs. The defendants assert that factors other than the ages of the

plaintiffs may account for any statistical [4734] deviations. These factors include, but are not limited to, the education, work performance, skills, flexibility and criticality of the plaintiffs as compared to other similarly situated employees.

The plaintiffs assert that some of these factors offered by the defendants were themselves influenced by the ages of the plaintiffs. Therefore, in determining whether the plaintiffs have met their burden of demonstrating this step of their claim, you must determine whether any statistical deviations you find have been proven – whether any statistical deviations you find have been proven were caused by the ages of the plaintiffs, or, on the other hand, by some other factors unrelated to the plaintiffs' ages.

If you find that the plaintiffs have met this initial burden, a presumption of discrimination arises and you must proceed to consider the second step discussed below. If you find that the plaintiffs have failed to meet this burden, you should find in favor of the defendants on the plaintiffs' disparate impact theory.

The second step requires you to determine whether the defendants are rebutted the presumption of discrimination arising under the first step of this theory. Under this step, the defendants must articulate, but not prove, a business justification for selecting the plaintiffs [4735] for termination of their employment in the Reduction in Force. This is not a burden of proof on the defendants and does not require the defendants to prove by any standard that the reason offered was the only reason for their decision to terminate the employment of the plaintiffs. Rather, the defendants have satisfied their burden in this step if you find that the defendants have presented a business justification for the selection of the plaintiffs for

termination of their employment in the Reduction in Force. You need not find, nor need the defendants prove, that such justification was essential or indispensable to the defendants' business. If you find that the defendants have met this minimal burden, the presumption of discrimination arising under the first step is rebutted and plays no further part in your deliberations.

If you find that the defendants have satisfied their burden in the second step, you must then determine whether the plaintiffs have established by a preponderance of the evidence that the reason offered by the defendants is a pretext or cover for discrimination. In this regard, the plaintiffs must prove on the basis of all the evidence presented that an alternative method would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants.

[4736] If you find that the plaintiffs have satisfied their ultimate burden in this third step, then you should find in favor of the plaintiffs on the disparate impact theory. If you find that the plaintiffs have failed to meet this ultimate burden, then you should find in favor of the defendants on the disparate impact theory.

* * *

[4741] in the past, each day at 9 o'clock, and we will not proceed past 5 o'clock. The jury has the right and the privilege to extend those hours if you wish, but not to reduce them.

* * *

Any objections to the charge as given other than previously noted, plaintiffs?

MR. DuCHARME: No, your Honor.

THE COURT: Defendants?

MR. HIGGINS: No objection.

THE COURT: Thank you. Please swear the marshal.

(Marshal duly sworn.)

THE CLERK: Court stands in recess.

* * *